
UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

JOE PHILLIP HARVEY,

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Petitioner,

versus

CIVIL ACTION NO. 1:09-CV-291

DIRECTOR, TDCJ-CID,

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Respondent.

**MEMORANDUM ORDER OVERRULING PETITIONER'S OBJECTIONS AND
ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

Petitioner Joe Phillip Harvey, an inmate at the Wynne Unit, proceeding *pro se*, brought this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The court referred this matter to the Honorable Earl S. Hines, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this court. The magistrate judge recommends that the petition be dismissed as barred by limitations.

The court has received and considered the Report and Recommendation of United States Magistrate Judge, along with the record, pleadings and all available evidence. Petitioner filed objections to the magistrate judge's Report and Recommendation.

The court has conducted a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b).¹ After careful consideration, the court concludes Petitioner's objections are without merit.

Petitioner's claim of actual innocence based on newly discovered evidence is not cognizable for purposes of federal habeas relief absent an independent constitutional violation. *See Herrera*

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After the Report was entered, petitioner filed a motion to amend his petition. The motion is granted, and the amended petition has been considered in conducting the *de novo* review.

v. Collins, 954 F.2d 1029, 1033-34 (5th Cir. 1992), *aff'd*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). This rule recognizes that the purpose of federal habeas corpus is not to correct errors of fact. *Herrera*, 506 U.S. at 400. The Supreme Court recently declined to resolve whether such a claim even exists. *House v. Bell*, 547 U.S. 518, 554-55, 126 S.Ct. 2064, 2086-87, 165 L.Ed.2d 1 (2006). Further, at the time he pleaded guilty, petitioner certainly knew the factual basis of his current claim that he did not steal the truck. Thus, petitioner's objections should be overruled.

Furthermore, the petitioner is not entitled to the issuance of a certificate of appealability. An appeal from a judgment denying federal habeas corpus relief may not proceed unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253; FED. R. APP. P. 22(b). The standard for granting a certificate of appealability, like that for granting a certificate of probable cause to appeal under prior law, requires the petitioner to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004); *see also Barefoot v. Estelle*, 463 U.S. 880, 893 (1982). In making that substantial showing, the petitioner need not establish that he should prevail on the merits. Rather, he must demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84. Any doubt regarding whether to grant a certificate of appealability is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000).

Here, the petitioner has not shown that any of the issues raised by his claims are subject to debate among jurists of reason. The factual and legal questions advanced by the petitioner are not novel and have been consistently resolved adversely to his position. In addition, the questions presented are not worthy of encouragement to proceed further. Therefore, the petitioner has failed to make a sufficient showing to merit the issuance of a certificate of appealability. Accordingly, a certificate of appealability shall not be issued.

ORDER

Accordingly, Petitioner's objections are **OVERRULED**. The findings of fact and conclusions of law of the magistrate judge are correct, and the report of the magistrate judge is **ADOPTED**. A final judgment will be entered in this case in accordance with the magistrate judge's recommendation.

SIGNED at Sherman, Texas, this 17th day of February, 2010.



MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE